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No. 91-537

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OCTOBER TERM, 1991

ROBERT GARCIA AND JANE LEE GARCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the retrial of petitioners on extortion charges, where the charges were submitted to the jury at the first trial on two legal theories, the jury returned a general verdict of guilty, and the court of appeals reversed because the evidence was insufficient to support one of the theories.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 938 F.2d 12. The opinion of the district court (Pet. App. B1-B12) is unreported. The opinion of the court of appeals reversing petitioners' convictions following their first trial (Pet. App. C1-C14) is reported at 907 F.2d 380.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. The petition for a writ of certiorari was filed on September 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were each convicted on one count of conspiring to commit extortion and to receive bribes and unlawful gratuities, in violation of 18 U.S.C. 371 (Count 1), and two counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts 2 and 3). The court of appeals reversed the convictions and remanded the case for a new trial. Pet. App. C1-C14. Prior to retrial, petitioners moved to dismiss the indictment on double jeopardy grounds, and the district court denied the motion. *Id.* at B1-B12. Petitioners appealed the district court's order, and the court of appeals affirmed. *Id.* at A1-A11.

1. The evidence at the first trial showed that in 1984 petitioner Robert Garcia, a Member of the House of Representatives, and his wife, petitioner Jane Garcia, met with Mario Moreno, an officer of Wedtech Corporation. Moreno told petitioners that Wedtech was having difficulties with a Navy contract. Jane Garcia stated that she and her husband could arrange a meeting with the Secretary of the Navy to resolve the problem. Robert Garcia boasted of his increasing influence in Congress and then proposed that Wedtech hire Jane Garcia as a public relations consultant. Pet. App. C6-C7.

Moreno initially refused to hire Jane Garcia, but petitioners persisted and suggested that she could be paid through an intermediary in Puerto Rico. The Garcias emphasized their influence with officials at the United States Postal Service, knowing that Wedtech was attempting to obtain postal contracts. Fearing that Robert Garcia would withhold his support for the postal contracts if they did not pay Jane Garcia, the Wedtech officers approved the payments.

Accordingly, Wedtech began sending monthly checks to Jane Garcia through the Puerto Rican intermediary. Those payments totalled \$76,000. Pet. App. C6-C8.

On August 2, 1985, Robert Garcia sought a meeting with Moreno to confer on a matter that was too sensitive to discuss over the telephone. At the meeting, Garcia asked to borrow \$20,000. Moreno replied that he would have to check with other Wedtech officials. Moreno obtained the money from Wedtech's "slush fund" and returned the same day to Garcia's office, where Garcia suggested that Wedtech provide a check payable to his sister, who would in turn forward the money to petitioners. Moreno believed that if he did not lend Garcia the money, Garcia would no longer help Wedtech. Although the loan was supposed to be repaid in October 1985, petitioners did not repay it until March 1986. Pet. App. C11-C12.

2. The government's charges of extortion were premised on two legal theories: extortion "by wrongful use of fear" and extortion "under color of official right." The district court submitted the extortion counts to the jury under instructions that permitted the jury to convict if it found facts supporting either theory. The jury convicted the Garcias on the extortion counts, while acquitting them of receiving bribes and unlawful gratuities. Although given the opportunity by the court, neither petitioners nor the government requested that special interrogatories be given to the jury to ascertain on which theory of extortion the jury had based its guilty verdicts. Pet. App. A2-A3.

3. On appeal, petitioners argued that the evidence was insufficient to support the first theory of extortion—extortion "by wrongful use of fear." The court of appeals agreed. Pet. App. C5-C14. Since the jury

was not given special interrogatories that would have disclosed the basis for the guilty verdicts, the court assumed that "the jury could have found the Garcias guilty of extortion under either theory presented by the government." *Id.* at C3. Because the evidence was insufficient to support one of the two theories, the court concluded that the verdict was "ambiguous" and that a new trial was required. *Ibid.*

4. On remand, petitioners moved to dismiss the indictment on double jeopardy grounds. Specifically, they argued that retrial on the "color of official right" theory of extortion was barred by the Double Jeopardy Clause because the jury might have acquitted on that theory at the first trial. The district court denied the motion. The court declined to apply the Double Jeopardy Clause in light of the fact that "there was no acquittal on the charge at issue." Pet. App. B7. The court also took note of petitioners' failure to request a special verdict or special interrogatories that would have resolved the ambiguity in the verdict. *Ibid.*

5. Petitioners sought interlocutory review of their double jeopardy contention, invoking this Court's decision in *Abney v. United States*, 431 U.S. 651 (1977). They argued that the court should infer from their acquittals on the bribery and gratuity counts that the jury also rejected the "color of official right" theory of extortion, which was based on the same conduct. Petitioners contended that retrial on that theory would therefore violate the Double Jeopardy Clause. The court of appeals found petitioners' reasoning unpersuasive, affirmed the district court's order, and directed that the mandate issue forthwith. Pet. App. A5-A11.

The court of appeals observed that petitioners' "implicit acquittal" argument was contrary to the

position they took in their initial appeal, where they had argued that their extortion convictions should be reversed because it was not possible to determine on which theory of extortion the jury relied. Pet. App. A5. The court stated that "given their position at the first appeal, as well as our basis for reversing their convictions, their current argument borders on the frivolous." *Ibid.* As the court explained, its previous opinion "explicitly stated" that there was "'no way of knowing on which theory of extortion the [petitioners] were convicted.'" Pet. App. A6, quoting *id.* at C14.

The court of appeals also concluded that the case did not present an implicit acquittal within the meaning of *Green v. United States*, 355 U.S. 184 (1957), where the jury failed to render a verdict on a disputed charge. Pet. App. A6. Here, unlike in *Green*, the "only unanswered question was under which of two extortion theories the jury had based its conviction." *Id.* at A6-A7. "And since the jury was never asked to state the basis for its conviction on the extortion charge, its silence on the question, unlike the silence of the jury in *Green*, signifies nothing." *Id.* at A7.

The court also concluded that an implicit acquittal on the "color of official right" theory could not be inferred from the acquittals on the bribery and gratuity charges, because the latter crimes each contain an element that extortion does not. Pet. App. A7. The court found that, because there was no basis for finding an implicit acquittal, there was no need to employ a "balancing test" to determine whether retrial should be barred. *Id.* at A7-A8. The court of appeals also rejected petitioners' contention that the government was to blame for the ambiguous verdict, noting that petitioners could have sought clarification at the time the verdict was rendered. *Id.* at A9-A10.

"Having rejected the opportunity to clarify this ambiguity, and having secured a reversal on its strength, [petitioners] cannot now disregard or deny its existence." *Id.* at A11.

Following the decision on their interlocutory appeal, petitioners were retried before a jury on the extortion conspiracy and two substantive extortion counts based solely on the "color of official right" theory. Jane Garcia was convicted on the conspiracy count and on the extortion charge contained in Count 2, while Robert Garcia was convicted on the extortion charge contained in Count 3. Petitioners are awaiting sentencing.

ARGUMENT

The court of appeals decided in a previous appeal that the government failed to meet its evidentiary burden as to one of the two extortion theories described in the indictment and that the court had "no way of knowing" which extortion theory the jury used in convicting petitioners. Pet. App. C14. The court therefore ordered a new trial. Notwithstanding that decision, petitioners now contend that the jury's verdict amounted to an "implicit acquittal" as to the theory for which there was sufficient evidence and that the Double Jeopardy Clause therefore prohibits their retrial. The court of appeals correctly rejected that argument, and its decision does not warrant further review.

1. We observe at the outset that there was no need for the court of appeals to reverse the original conviction in this case. This Court has long followed the "general rule" that when a jury returns a guilty verdict on a count charging several acts in the conjunctive, "the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970). Similarly,

where a jury returns a guilty verdict on a count charging an offense under two alternative theories, the verdict should stand if the evidence is sufficient as to either theory. Thus, there was no occasion for the court of appeals to set aside the original conviction, because there was sufficient evidence for a rational trier of fact to find that petitioners committed the offense charged.¹

Having set aside the conviction, however, the court of appeals correctly concluded that there was no basis for finding an implicit acquittal that would bar retrial. Far from acquitting petitioners, the jury convicted them on the extortion counts. It is unclear only whether the jury convicted them on a theory of extortion under color of official right, which was sufficiently proved, or on a theory of wrongful use of fear, for which there was insufficient evidence. The rational assumption is that the jury convicted petitioners on the theory for which there was sufficient evidence. There is no reason to believe that the jury convicted petitioners on the insufficiently proved theory and chose instead to acquit them on the theory for which there was sufficient proof.

Petitioners argue (Pet. 17) that the courts below should have inferred an acquittal on the "color of official right" theory from the jury's acquittal of petitioners on the bribery and gratuity counts. As the

¹ We have recently relied on the same general rule in *Griffin v. United States*, No. 90-6352 (argued Oct. 7, 1991). The question there was whether a conviction for a multiple-object conspiracy must be set aside when the jury returns a general verdict of guilty and the evidence is insufficient to support one of the objects of the conspiracy. We urged that when a conspiracy count identifies several objects of the conspiracy in the conjunctive, a jury's general verdict should stand if there is sufficient evidence as to any of the objects. See 90-6352 U.S. Br. 8-9.

court of appeals recognized, there is no basis for drawing that inference. Pet. App. A7. The offenses of bribery and illegal receipt of gratuities each contain an element that extortion under color of official right does not contain; hence, the jury could have acquitted petitioners of the bribery and gratuity offenses based on considerations not relevant to the extortion offense.² Indeed, the acquittals on the bribery and gratuity counts were no more inconsistent with convictions based on the "color of official right" theory of extortion than with convictions based on the "wrongful use of fear" theory of extortion. Yet the jury plainly believed petitioners had committed extortion under at least one of the two theories. The jury's express acquittal on the bribery and gratuity charges says nothing about what theory the jury relied on in finding petitioners guilty of extortion.

2. Petitioners argue (Pet. 17-20) that the trial court should have employed a "balancing test" in determining whether retrial was permissible and should have weighed the public's interest in a retrial against petitioners' interest in avoiding the "undue vexation" that a retrial would cause. They derive their "balancing test" from the Second Circuit's decision in *United States ex rel. Jackson v. Follette*,

² Bribery, unlike extortion, requires proof of a corrupt intent to be influenced. See 18 U.S.C. 201(c) (Supp. IV 1986). Thus, as the Seventh Circuit recognized in *United States v. Holzer*, 840 F.2d 1343, 1351, cert. denied, 486 U.S. 1035 (1988), "it does not necessarily follow that if [a public official] extorted money [under color of official right] * * * he must have accepted a bribe." Likewise, the gratuity statute contained an element not required in the extortion statute—that the payment be for the public official himself, as opposed to a friend or family member. See 18 U.S.C. 201(g) (Supp. IV 1986). Here, there was some dispute at trial whether the payments at issue were for Representative Garcia or solely for his wife.

462 F.2d 1041, 1049, cert. denied, 409 U.S. 1045 (1972). The court below properly held the *Jackson* test is inapplicable here because there was no basis for finding an implicit acquittal in this case. Pet. App. A8. The court additionally determined that even under the *Jackson* test a retrial would be permitted. *Ibid.*³

Petitioners argue (Pet. 20-24) that retrial should have been barred under *Jackson* because the government was responsible for the ambiguous verdict. In assigning blame to the government, petitioners argue, first, that the extortion counts were duplicitous. Pet. 20. The court of appeals correctly rejected that argument. Pet. App. A8-A9. Rule 7(c)(1), Fed. R. Crim. P., explicitly permits the government to allege in a single count that "the defendant committed [the offense] by one or more specified means." Each extortion count here charged a single offense, although it described two different ways by which that single offense was committed. Thus, the indictment was not duplicitous. See, e.g., *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988).⁴

Petitioners also fault the government for the ambiguous verdict on grounds that the government pressed the insufficiently proved "wrongful use of

³ In *Jackson*, the court determined that retrial was allowed, notwithstanding the possibility that the jury may have acquitted the defendant on the theory to be retried, because the defendant could have clarified the ambiguity at trial. 462 F.2d at 1049-1050. The same is true here. Pet. App. A8-A9. Indeed, the court of appeals observed that petitioners may have deliberately chosen, for tactical reasons, to bypass that opportunity. *Id.* at A10-A11.

⁴ Petitioners mistakenly compare the indictment in this case to that in *Abney v. United States*, *supra*. See Pet. 20 n.11. There, the indictment charged two distinct offenses in a single count: conspiracy to commit extortion and attempted extortion. 431 U.S. at 664.

fear" theory and that it failed to request special interrogatories to resolve the ambiguity. Pet. 21-24. The mere fact that the government failed to adduce sufficient evidence to prove one theory of its case beyond a reasonable doubt provides no basis for barring a trial on a sufficiently proved theory. As for the government's failure to seek clarification of the verdict, petitioners had the same opportunity and declined to pursue it.⁵

3. Petitioners mistakenly rely on *Green v. United States*, 355 U.S. 184 (1957), as authority for barring their retrial. In *Green*, the defendant was indicted for first degree murder. The trial court instructed the jury that it could find the defendant guilty of either first degree murder or, alternatively, second degree murder. The jury found him guilty of second degree murder, and its verdict was silent on the first degree murder charge. This Court held that the defendant's subsequent prosecution for first degree murder, following the reversal of the second degree murder conviction, was barred by the Double Jeopardy Clause because the jury at the first trial had implicitly acquitted him of the first degree murder charge. 355 U.S. at 190. The Court explained that its finding of an implicit acquittal rested on the fact that "[w]hen given the choice between finding [the defendant] guilty of either first or second degree murder it

⁵ None of the cases cited by petitioners relating to special verdicts or special interrogatories suggests that requesting them is solely the government's responsibility. *United States v. Ruggiero*, 726 F.2d 913, 926 (2d Cir.) (Newman, J., concurring in part and dissenting in part), cert. denied, 369 U.S. 831 (1984); *United States v. Adcock*, 447 F.2d 1337, 1338-1339 (2d Cir.), cert. denied, 404 U.S. 939 (1971); *Brown v. United States*, 299 F.2d 438, 440 n.3 (D.C. Cir.) (Burger, J.), cert. denied, 370 U.S. 946 (1962).

chose the latter.” *Ibid.* In this case, on the other hand, the jury returned a general verdict of guilty and did not indicate which of the alternative theories of extortion the jury accepted. As the court of appeals recognized, “the present case differs from *Green* in a significant way.” Pet. App. A6.

Petitioners’ reliance on the Fourth Circuit’s decision in *United States v. Stanley*, 597 F.2d 866 (1979), is also misplaced. In *Stanley*, the court of appeals held that where, in a bench trial, one of the guns charged in a two-gun possession count was erroneously admitted, double jeopardy barred a retrial for possession of the gun whose admission was proper. 597 F.2d at 872 n.7. That holding, however, rested on the court of appeals’ understanding that the district court had found the defendant guilty of possessing one of the guns and not guilty of possessing the other, without specifying on which gun it convicted and on which gun it acquitted. *Ibid.* Here, by contrast, there is no ground for believing that the jury acquitted petitioners on the “color of official right” theory of extortion. Moreover, as the Second Circuit recognized, “[i]t is far from certain that the fourth circuit has interpreted *Stanley* as broadly as the [petitioners] do.” Pet. App. A8. In *United States v. Head*, 641 F.2d 174, 181 (1981), cert. denied, 462 U.S. 1132 (1983), the Fourth Circuit remanded for retrial of a conspiracy count where certain cited overt acts were invalid and the general verdict did not reveal on which overt acts the jury had relied.

The Sixth Circuit’s decision in *Saylor v. Cornelius*, 845 F.2d 1401 (1988), also does not help petitioners. In *Saylor*, the defendant was charged in state court with one count of murder encompassing two different theories: murder as an accomplice and murder by conspiracy. Despite the absence of evi-

dence of a conspiracy, the trial judge instructed the jury only on the conspiracy theory of liability. The defendant objected to any instruction on that theory, while the prosecution neither objected nor sought an instruction on accomplice liability. The state appellate court reversed on the ground that the evidence was insufficient to support the conspiracy theory, but in a subsequent opinion held that the defendant could be retried on the accomplice theory. On appeal from the denial of his federal habeas corpus petition, the court of appeals held that retrial would violate the Double Jeopardy Clause because, but for the prosecution's failure to seek proper instructions, the accomplice theory could have been presented to the jury. *Id.* at 1403. Thus, *Saylor* is a case in which retrial was barred not because the jury's verdict failed to reveal the theory on which it was based, but because the only valid theory of liability was one that the prosecutor had not sought to have submitted to the jury.⁶

⁶ The district court cases cited by petitioner—*United States v. Slay*, 717 F. Supp. 689 (E.D. Mo. 1989), and *United States v. Gray*, 705 F. Supp. 1224 (E.D. Ky. 1988)—also are inapposite. In those cases, convictions for mail fraud had been set aside as a result of *McNally v. United States*, 483 U.S. 350 (1987). Both courts held that retrial on the "property loss" theory of mail fraud was barred because, although the theory had been charged in the indictments and submitted to the juries at the first trials, the government had not truly relied on it. Here, by contrast, the government's closing argument focused on the "color of official right" theory. See Gov't C.A. Br. 15 n.*. Indeed, insofar as *Slay* and *Gray* hold that the Double Jeopardy Clause bars retrial on a theory that the government failed to press fully at the first trial, they implicitly suggest that retrial is not prohibited where, as in this case, the government met its obligation at the first trial "to offer whatever proof it could assemble" in support of the theory. *Burks v. United States*, 437 U.S. 1, 16 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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